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UNCLAS SECTION 01 OF 05 MEXICO 002073

SIPDIS

STATE FOR EB/IFD/OIA HEATHER GOETHERT AND KIMBERLY BUTLER
STATE FOR L/CID CAMERON HOLLAND
STATE FOR WHA/MEX AND WHA/EPSC
TREASURY FOR IA MEXICO DESK RACHEAL JARPE

E.O. 12958: N/A
TAGS: EINV ETRD KIDE CASC OPIC PGOV MX
SUBJECT: MEXICO 2008 REPORT ON INVESTMENT DISPUTES
ANDEXPROPRIATION CLAIMS - PART 2

REF: STATE 43784

CONTINUED FROM SEPTEL

11.a. Claimants J

b. 2002

c. Claimants are joint venturers in Mexican facilities for the production and distribution of high fructose corn syrup (HFCS) for use by Mexican soft drink bottlers and other food and drink processors. They challenge the same soft drink tax as Claimant I above. Since the tax took effect on January 1, 2002, Claimants substantially ceased the manufacture and sale of HFCS and stopped importing and distributing HFCS for use by Mexican soft drink bottlers.

This dispute became a NAFTA Chapter 11 arbitration claim when Claimants filed their request for institution of arbitration proceedings against the GOM on August 4, 2004. Claimants allege the GOM's tax on HFCS violated the national treatment obligation under NAFTA Article 1102, the prohibition on performance requirements in NAFTA Article 1106 and the prohibition on indirect expropriation in NAFTA Article 1110. Claimants seek damages in excess of USD 100 million.

On March 6, 2006, the World Trade Organization (WTO) informed the Mexican government that it had rejected Mexico's appeal of the WTO's initial ruling that Mexico's 20 percent tax on beverages using sweeteners other than sugar, principally HFCS, was illegal. In response in May 2006, then President Fox sent an initiative to the Lower House of the Congress to eliminate the tax in order to comply with WTO rulings. However, it was not until the new Congress was in place in September 2006, that this issue began to be discussed as part of the bill outlining the 2007 Mexican budget. The initial 2007 budget proposal sent to Congress in December 2006 by the Calderon administration called for the removal of the 20 percent tax on drinks made with HFCS, complying with WTO rulings, and instead proposed a 5 percent tax on all soft drinks, regardless of the type of sweetener. The Senate rejected this proposal and all taxes on soda, including the 20 percent tax on HFCS, were eliminated in the final budget bill.

Although the tax is no longer in effect, Claimants are still seeking before the Chapter 11 tribunal compensation for the damages they sustained as a result of the tax. Claimants' NAFTA Chapter 11 claim is still pending. A hearing on the merits has already taken place, and the parties are awaiting a decision.

In keeping with NAFTA Chapter 11 procedures, the Embassy does

not take an active role on behalf of Claimants while dispute resolution measures are proceeding.

12.a. Claimant K

b. 2002

c. Claimant produces high fructose corn syrup (HFCS) in the U.S., some of which it sells and distributes through a business unit in Mexico for use by Mexican soft drink bottlers. Claimant challenges the same soft drink tax as Claimants I and J above. Since the tax took effect on January 1, 2002, Claimant's distribution facilities in Mexico have been largely idle and HFCS production capacity in the U.S. has been diverted to markets other than Mexico.

This dispute became a NAFTA Chapter 11 arbitration claim when Claimant filed its request for institution of arbitration proceedings against the GOM on December 29, 2004. Claimant alleges the GOM's tax on HFCS violated the national treatment obligation under NAFTA Article 1102, the obligation to provide fair and equitable treatment under NAFTA Article 1105(1), the prohibition on performance requirements in NAFTA Article 1106 and the prohibition on indirect expropriation in NAFTA Article 1110. Claimant seeks damages in excess of USD 100 million.

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Although the tax is no longer in effect, Claimant is still seeking before the Chapter 11 tribunal compensation for the damages it sustained as a result of the tax. Claimant's NAFTA Chapter 11 claim is still pending. The parties have recently completed briefing on the issues, and a hearing on the merits is scheduled for early October 2007.

In keeping with NAFTA Chapter 11 procedures, the Embassy does not take an active role on behalf of Claimant while dispute resolution measures are proceeding.

13.a. Claimants L

b. 1985

c. In 1985, Mexican citizens Alfonso Vizcaino and Edelberto Verduzco (brothers-in-law) unlawfully seized approximately 125 acres of agricultural land owned by Claimants, who are brother and sister and U.S. citizens, in Tecoman, Colima. The land was and continues to be a commercially profitable source of coconut, lime, mango and papaya, some of which are exported to the U.S., together with cattle raising and shrimp farming. Claimants inherited the land from their uncle, a U.S. citizen and long-time resident of Tecoman. Vizcaino and Verduzco own land adjacent to the property and are powerful figures in the state of Colima, with close ties to previous governors.

After the uncle's death in 1985, Vizcaino and Verduzco fraudulently titled the property in their names and used their own workers to exploit the land, informally known as "El Buen Vecino" (Good Neighbor) ranch. Claimants filed suit to have their rights to the property recognized. In December 2001, after more than 15 years of legal proceedings in the local, state and federal courts, the Mexican federal court of appeals in Guadalajara denied the last appeal and upheld Claimants' ownership rights. On February 6, 2002, the land was turned over to their representatives.

Less than one week later, on February 12, 2002, Carlos Montes Salazar, President of the local labor tribunal in Tecoman, led an invading mob of workers from Verduzco's other properties onto the ranch. The workers claimed to be on strike against Verduzco for back pay and other benefits. However, the paperwork requesting approval for the strike was filed a year earlier with the labor tribunal, yet the workers did nothing until 2002. Since the strike was against Verduzco, Claimants were not formal parties in the labor action and were placed in the predicament of relying on their long-time opponent Verduzco to fight to get his own workers thrown off the land he coveted. None of the signs normally indicating a strike in Mexico (red and black flags, protests, etc. are evident on the ranch, and the "strikers" are working the land.

The Ambassador, the Consul General and other representatives from the Consulate have met with numerous officials in Colima, including two governors, requesting that the final order of the Mexican court be implemented. In a meeting with officials from the Consulate in September 2003, then-governor Fernando Moreno Pena agreed that the strike appeared to be a sham used as a delaying tactic to deny effective ownership rights to the family. He also asserted that to his knowledge this was the only strike in the entire state of Colima. Although the governor indicated he would personally look into the matter and resolve it quickly, he took no action. His successor, Gustavo Vazques Montes (apparently a cousin of labor magistrate Carlos Montes), likewise took no action to enforce the court's order before he died on February 24, 2005.

On March 31, 2004, American Consul in Guadalajara met with

Vizcaino, his attorney and his son to discuss the case. He claimed the workers were striking against him in a dispute over benefits, and he saw no end in sight to the strike. He also claimed that he purchased the property from one of the Claimants years ago, but that they reneged on the agreement. When asked why he had not accepted the final decision of the court, Vizcaino argued that Claimants had not won the litigation. At that point, Vizcaino's attorney interjected and agreed that Claimants had won that case giving them full rights and possession to the property and that he was only representing Vizcaino in a separate breach of contract suit filed in 2001. Vizcaino and his attorney then began arguing over the case. Within an hour after the meeting, the attorney contacted the Consulate to confirm his earlier statements and to advise that he no longer represented Vizcaino. The estimated value of the land is USD 400,000. The Claimants have since received an offer to purchase the property from Verduzco and Vizcaino, also assuming responsibility for the strikers if they remain on the property. In March 2006, a payment was made to a court account, although closing of the transaction was delayed, according to the Claimant's attorney, in order to clarify certain tax issues with the local authorities.

In April 2007 the U.S. Consulate in Guadalajara's American Citizen Services Section ascertained from the Claimants' attorney that the transaction still had not closed (although the governor of Colima has informed the Consulate that there are no outstanding state or federal taxes). In April 2007, the Consulate separately contacted the Claimants, who reported that they have not received any money from the

attorney or an update on the status of the case. On June 19, 2007 Claimants contacted the Consulate to reiterate that they had not heard from their attorney for two months.

After several attempts, on June 17, 2008, ACS staff in Guadalajara was able to contact Claimants' attorney who confirmed that he had talked to his clients earlier the same day. He confirmed that one of his associates, deemed as a trustee, was in possession of the funds from the sale of the property. Further, he reassured us that the legal recourse to reduce the state tax issue, still outstanding, could take up to two months to be resolve. A successful outcome, according to him, would allow the claimants to receive a greater sum from the proceeds. The Consulate continues to monitor the case.

14.a. Claimant M

b. 2002

c. Claimant leased planes to a Mexican aviation company, Allegro, that later went bankrupt. Claimant began a legal battle to get its planes returned. U.S. and Mexican courts eventually ruled in their favor, and Claimant took possession of its planes. However, since that time, Claimant has been unable to get the Mexican Civil Aviation Board (DGAC) to deregister their aircraft, a necessary step before the company can bring the planes back to the US. Claimant's losses come from two sources: first, several planes were not stored properly after they were seized and are now deemed un-flyable; second, Claimant is paying high maintenance and storage fees for the remaining planes that are flyable. Claimant alleges it has had difficulties dealing with the GOM on almost every step of its struggle to repossess and return the planes to the U.S.

DGAC's current refusal to deregister the aircraft is based on a ruling by the Mexican Labor Board, apparently following an injunction filed by Allegro's former employees' union. Claimant argues that the Labor Board's decision does not apply to deregistration of the aircraft, and that it is based on a statute deemed unconstitutional by higher courts. Claimant has informed U.S. Embassy and DGAC that it is formally filing suit against the DGAC under a new law that allows private industry to sue GOM entities if they are not properly applying the law. In late May 2005 the DGAC informed Embassy that it asked the Labor Board for clarification, but to date it has not received a response.

15.a. Claimant N

b. 2000

c. Claimant is an investment company involved in commercial

development, which owned a property of approximately 97,000 square meters (24 acres) in one of the most expensive areas of Mexico. On November 10, 2000, the federal government allegedly expropriated 13.79 percent of the area of the property in question. According to Claimant, the GOM deprived it of its land and also interfered with its plans for commercial development of the area.

Claimant submitted a Notice of Intent under NAFTA Chapter 11 on August 28, 2001 claiming a breach of NAFTA Articles 1102, 1103, 1105, and 1110 (Expropriation). The Claimant seeks relief in the form of either the restoration of the property in its original state, as well as the payment of USD 30 million in damages, plus corresponding interest; or the payment of USD 210 million.

In keeping with NAFTA Chapter 11 procedures, however, the Embassy does not take an active role on behalf of Claimant while dispute resolution measures are proceeding.

16.a. Claimants O

b. 2004

c. Claimants are a group of Texas farmers who allege their investments in water have been harmed through Mexican measures amounting to expropriation under NAFTA Article 1110.

Claimants submit that from 1992 to 2002, Mexico expropriated water in the Rio Grande in Mexico. Claimants allege that they had a right to that water under the 1944 Treaty between the United States and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, U.S.-Mexico, T.S. No. 944. They allege that Mexico diverted and seized approximately 1,013,056 acre-feet of irrigation water in violation of the Treaty. The specific conduct Claimants complain of includes Mexico's building of certain dams and reservoirs, which had the effect of manipulating the flow of water in Mexico's favor.

Claimants filed a Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter 11 on August 27, 2004 and a Notice of Arbitration on January 19, 2005. They estimate their damages to be between USD 320,124,350 and USD 667,687,930. On June 19, 2007, the claims were dismissed for lack of jurisdiction.

17.a. Claimant P

b. 2005

c. Claimant is a U.S. company that invested USD 8 million in a conveyor belt for transporting aggregate materials between the U.S. and Mexico. The conveyor belt crosses the border at the cities of Mexicali and Calexico.

The State of Baja California issued an environmental permit in 2001, but refused to renew the permit in 2003. A revision of the scope of work allowed the firm to proceed with a municipal permit from Mexicali and a diplomatic note issued by the Federal Government. The firm received final U.S. and Mexico building permits in March 2005, but in October 2005 police officers from the State of Baja California entered the plant and placed closure seals on the equipment. In November 2005 the firm obtained a court injunction voiding the state's closure action, but later the same day the City of Mexicali revoked its municipal environmental permit. In March 2006, officials from the Department of Ecology for the State of Baja California, accompanied by three truckloads of armed police officers, entered the facility and placed closure seals on plant equipment for a second time.

The U.S. owner of the firm reported that in an April 2006 meeting, the Cabinet Secretary for the state Department of Ecology claimed that the company had not complied with his department's regulatory requirements and that it has various omissions in its (2001 and 2003) permit applications to his department - but he refused to specify the nature of the alleged omissions and compliance failures. (He also alleged that the company was in violation of local zoning ordinances, but this issue lies outside the jurisdiction of his agency, according to the firm's legal counsel.) The Embassy has raised the issue with the Secretariat of Foreign Relations and the Mexican Customs Agency.

Mexican authorities at various levels have largely rebuffed or ignored Consular efforts to use our good offices. U.S. EPA Administrator Steve Johnson will tour the conveyor belt facility and meet with Baja California Gov. Elorduy on June 28, 2007. On October 26, 2007, the state government issued permits to begin allow the company to begin operations. The company has been in full operation since January 2008 and the matter is considered resolved by both the company and Embassy

officials.

18.a. Claimant Q

b. 2000

c. Claimant purchased undeveloped beachfront property in Puerto Escondido in May of 1999 through the Fideicomiso system. In 2000, claimant begin plans for developing the property and hired a builder, an investment partner and a contractor. A temporary dwelling was erected and the contractor moved onto the property to begin work. Shortly thereafter, the Attorney General of Chiapas sent several Chiapas State Judicial Police to the property. They arrested the contractor and turned him over to the local authorities where he spent about the next year in jail until it was determined that he had not committed any crime. The State Judicial Police moved onto the property with officers inhabiting the temporary dwelling. While Claimant is technically still the owner of the property, the police effectively prohibit development by barring access to the property. During a visit to the property around 2000. the Consul General from Mexico City was threatened by a security guard posted at the property.

The Claimant and her attorney believe that Oaxaca state government officials are behind this attempt to obtain her property. The Embassy has approached the Governor expressing the concern and interest of the U.S. Government in this case

20.a. Claimant R

b. 2007

c. Claimant is a U.S. company who won a concession from the municipality of Tlanepantla to install and operate a parking meter system in the city. The newly elected mayor decided to withdraw the concession based on a technicality, though the Embassy believes that political pressure from an opposition party contributed to the decision to remove the meters. The city claimed that a transfer of concession was improperly completed and that the Claimant owed back fines and revenue. Claimant invested approximately $5 million USD in the project and requested that their property (the parking meters) be returned.

In August 2007, the mayor and municipality officials accepted an offer presented by the Embassy to meet with company representatives (previously the municipality had refused to meet with the company). The case subsequently escalated and is now being heard in the Mexican court system. The Embassy has not received updates from the company but will continue to monitor the case.

Visit Mexico City's Classified Web Site athttp://www.state.sgov.gov/p/wha/mexicocity and the North AmericanPartnership Blog at http://www.intelink.gov/communities/state/nap /

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